Supreme Court, U.S.
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No. 98-432

In The

Supreme Court of the United States

October Term, 1998

NICK PARRINO, as Administrator of the Estate of Stephen Frank Parrino, Deceased, and Successor to Stephen Parrino, D.C.,

Petitioner,

vs.

FHP, INC., a California corporation; FHP HEALTHCARE, a California corporation, A.K.A. FHP VALUE PLAN; FHP ADMINISTRATORS, a Division of Ultralink, Inc., a California corporation, dba Friendly Hills Regional Medical Center; FRIENDLY HILLS MEDICAL GROUP, a general partnership; FRIENDLY HILLS REGIONAL MEDICAL CENTER GUILD, INC., a California non-profit corporation; REM ALMIRANTE, M.D., an individual; JEFFREY WOLF, M.D., an individual,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does ERISA preempt state common law claims alleged against an ERISA plan administrator for injuries arising from its alleged improper handling of a claim for medical benefits?

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

I. INTRODUCTION.

FHP Inc., FHP Healthcare (erroneously sued and served herein as FHP Healthcare aka FHP Value Plan), FHP Administrators, a division of Ultralink, Inc., and Remedios Almirante, M.D. (erroneously sued and served herein as Rem Almirante, M.D.) (collectively "Respondents") hereby respond to the Petition for Writ of Certiorari ("Petition") filed by Petitioner Nick Parrino ("Petitioner"). Respondents respectfully request that this Court deny the Petition.

This is an action for damages arising from an ERISA plan's alleged delay in processing a claim for medical benefits. The district court dismissed the complaint, and the Ninth Circuit affirmed. Both courts recognized that this case involves garden-variety utilization review claims of the kind consistently held preempted by ERISA since this Court's decision in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987).

Review by this Court is unnecessary because (a) the decision of the Ninth Circuit Court of Appeals[1] does not conflict with any decision of any other United States court of appeals or any decision of this Court, and (b) the Ninth Circuit's decision was dictated by this Court's previous decisions. *See* Sup. Ct. Rule 10.

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[1] The opinion of the Ninth Circuit Court of Appeals is reported at 146 F.3d 699 (9th Cir. 1998). A copy is included as an appendix to the Petition.

II. STATEMENT OF THE CASE.

As alleged in the pleadings, Steve Parrino ("Steve") belonged to an FHP group health plan. (S.E.R. 1, Exh. A at p. 5, ¶ 13; S.E.R. 43 at 6, ¶ 15.) Although he worked as a chiropractor, Steve received medical benefits through the employee health plan negotiated by FHP with Parrino Trucking, the trucking business owned by Steve's father, Nick Parrino. (S.E.R. 17, Exh. A.)

In the fall of 1993, Steve, who had a history of lung cancer preceding his enrollment in FHP, was diagnosed with a metastatic brain tumor. (S.E.R. 43 at 8, ¶ 21; E.R. at 63-64.) FHP and Friendly Hills[2] referred him to Loma Linda University Medical Center for surgery. Loma Linda physicians operated to remove the brain tumor on October 19, 1994. (S.E.R. 43 at 8-9, ¶ 22.) The surgery was, in plaintiff's words, "a complete success," and Steve was "extremely grateful" to his physicians. (*Id.*)

The Loma Linda physicians recommended that Steve receive proton beam therapy as a prophylactic measure once he recovered from surgery. (*Id.*) Steve submitted a claim for this treatment. Although FHP and Friendly Hills initially denied the claim, they ultimately agreed to authorize payment for the treatment (about two months after the claim was first made). (*Id.* at 11, ¶ 31.) In the

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[2] There are two sets of defendants, the FHP defendants and the Friendly Hills defendants. We use "FHP" to refer to FHP, Inc.; FHP Healthcare (wrongly sued and served herein as FHP Healthcare aka FHP Value Plan); FHP Administrators, a division of Ultralink, Inc.; and Remedios Almirante, M.D. We use "Friendly Hills" to refer to Friendly Hills Healthcare Network; Friendly Hills Medical Group; and Jeffrey Wolf, M.D.

meantime, the metastatic tumor had recurred, and the Loma Linda surgeons had to operate again, this time with less success. (*Id.* at 11-12, ¶¶ 30, 33.) The tumor spread, and Steve died on June 25, 1994. (*Id.* at 12, ¶ 34.)

Three days before his death, Steve filed a complaint against FHP, Friendly Hills, and certain of their employees, in the Los Angeles Superior Court. The complaint alleged various state common law tort claims, including fraud and violation of California's commercial blockade statute, California Civil Code section 3427.1. (*See* S.E.R. 1, Exh. A.) The gravamen of the complaint was injury caused by FHP's "defective" economic design, which was allegedly responsible for the delay in approving benefits. (*See* S.E.R. 43 at 6-8, ¶¶ 16-19, 20; 11-12, ¶ 31; 13-15, ¶¶ 38-39; 18-20, ¶ 45.)

On July 21, 1995, defendants removed the case to federal district court. FHP later filed a motion to dismiss the action on the grounds of ERISA preemption and failure to state a claim. (S.E.R. 6; S.E.R. 7.) Plaintiff, in turn, moved to remand the case to state court. (C.R. 14; E.R. at 120-24.) The district court denied the motion to remand, and, after allowing plaintiff to amend his complaint, granted defendants' motions to dismiss. (S.E.R. 63.)

The Ninth Circuit Court of Appeals affirmed. The majority held that Parrino's state law claims (with the exception of his spoliation claims, which the court held properly dismissed) were preempted by ERISA. *See* opinion, Petition at 11a ("All of Parrino's non-spoliation causes of action are predicated upon alleged improper handling of his claim for treatment by FHP and Friendly

Hills: Parrino's causes of action for commercial blockade, breach of the implied covenant of good faith and fair dealing, civil conspiracy, and general negligence are based upon his allegation that FHP and Friendly Hills failed properly to process his claim for proton beam therapy; his cause of action for fraud in the inducement is based upon the defendants' failure to disclose the alleged defects in their claims processing system"). Judge Fernandez dissented on procedural grounds related to removal, although he stated he "would be inclined to agree that Parrino should not ultimately prevail." Opinion, Petition at 14a (Fernandez, J., dissenting).

III. NONE OF THE ISSUES RAISED IN THE PETITION WARRANTS A WRIT OF CERTIORARI.

A. Certiorari Is Not Warranted On The Fraud Claims Because The Ninth Circuit's Decision Is Consistent With The Decisions Of This Court And The Other Courts Of Appeals.

1. ERISA Preempts State Law Claims, Including Fraud Claims, That Relate To The Processing Of Claims For Medical Benefits.

Claims based on "utilization review" (the process by which an ERISA plan administrator determines coverage of prospective medical treatment) have long been deemed preempted under ERISA sections 514(a) and 502(a) by this Court and the United States Courts of Appeals. *See, e.g., Pilot Life*, 481 U.S. at 47, 52-57; *Crull v. GEM Ins. Co.*, 58 F.3d 1386, 1391 (9th Cir. 1995); *Spain v. Aetna Life Ins. Co.*, 11 F.3d 129, 131-32 (9th Cir. 1993), *cert. denied*, 511 U.S. 1052 (1994); *Olson v. General Dynamics Corp.*, 960 F.2d 1418, 1423 (9th Cir. 1991), *cert. denied*, 504 U.S. 986 (1992);

Kanne v. Connecticut Gen. Life Ins. Co., 867 F.2d 489, 493-94 (9th Cir. 1988), *cert. denied*, 492 U.S. 906 (1989); *see also Dukes v. U.S. Healthcare*, 57 F.3d 350, 360-61 (3d Cir. 1993), *cert. denied*, 516 U.S. 1009 (1995); *Kuhl v. Lincoln Nat'l Health Plan, Inc.*, 999 F.2d 298, 303-04 (8th Cir. 1993), *cert. denied*, 510 U.S. 1045 (1994); *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1332-33 (5th Cir.), *cert. denied*, 506 U.S. 1033 (1992).[3]

In *Pilot Life*, this Court held that ERISA preempts state common law contract and tort claims, including claims for fraud in the inducement, in suits asserting the improper processing of benefits claims by ERISA participants and beneficiaries. ERISA preempts such claims both because state efforts to regulate descriptions of plan coverage "relate to" plan administration for purposes of section 514(a), ERISA's preemption clause, and because they conflict with section 502(a), ERISA's exclusive remedial provision. *See Pilot Life*, 481 U.S. at 42, 47, 52-57.

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[3] This Court recently affirmed the viability of *Pilot Life*. *See New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671, 1683 (1995) ("we do not hold today that ERISA pre-empts only direct regulation of ERISA plans, nor could we do so with fidelity to the views expressed in our prior opinions on the matter" (citing *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 139 (1990); *Pilot Life*, 481 U.S. at 47-48; *Shaw v. Delta Air Lines*, 463 U.S. 85, 98 (1983)). The Ninth Circuit, too, has held that cases following *Pilot Life* remain good law. *See Crull*, 58 F.3d at 1391 (holding state law claims based on denial of coverage pre-empted by ERISA). "[*New York Blues*] does not . . . signal a retreat from *Pilot Life*'s holding that the civil enforcement provisions of ERISA § 502(a) [29 U.S.C.A. § 1132(a)] were intended by Congress to be exclusive." *Id.* at n.3.

Following *Pilot Life*, the United States courts of appeals have consistently held that ERISA preempts state law fraud claims in cases alleging improper claims processing. *See, e.g., Farr v. US West, Inc.*, 58 F.3d 1361, 1366 (9th Cir. 1995); *Olson*, 960 F.2d at 1422-23; *Davidian v. Southern California Meat Cutters Union & Food Employees Ben. Fund*, 859 F.2d 134, 135 (9th Cir. 1988); *and see Shea v. Esensten*, 107 F.3d 625, 627 (8th Cir. 1997); *Anderson v. Humana, Inc.*, 24 F.3d 889, 892 (7th Cir. 1994); *Consolidated Beef Indus., Inc. v. New York Life Ins. Co.*, 949 F.2d 960, 964 (8th Cir. 1991), *cert. denied*, 503 U.S. 985 (1992); *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 979 (5th Cir. 1991).

The courts have specifically held state law fraud claims preempted where, as here, the statements in question were allegedly made "pre-contract," or prior to plaintiff's becoming a participant in the plan. In *Olson*, for example the Ninth Circuit held ERISA preempted plaintiff's claim that he was induced to take a job on the basis of fraudulent statements concerning the benefits he would receive. (*See Olson*, 960 F.2d at 1419-22.) Similarly, the court held ERISA preempted the *Davidian* plaintiff's claim that he would have elected other coverage had he not been misled as to the plan's reimbursement limits. (*See Davidian*, 859 F.2d at 134-35.)

The complaint at issue here sought damages arising from FHP's alleged delay in processing Steve Parrino's claim for medical benefits. In an effort to plead around ERISA, Petitioner included a claim for fraudulent inducement, alleging Steve would not have joined the plan had

he known how his claims would be processed.[4] But under this Court's decision in *Pilot Life* and the authorities cited above, a plaintiff cannot avoid ERISA by characterizing a utilization review claim as a claim for fraudulent inducement. Because such claims relate to plan administration and conflict with ERISA's exclusive remedial provision, they are preempted by ERISA. *See Pilot Life*, 481 U.S. at 42, 47, 52-57.

2. Petitioner's Argument Regarding An Inter-circuit Split Is Untimely And Incorrect. The Courts Of Appeals Agree ERISA Pre-empts State Law Fraud Claims Against ERISA Entities.

Petitioner contends there is a split of authority among the circuit courts that requires Supreme Court review. (*See* Petition at 5 and 9, alleging a "circuit split," *and see* Petition at 10, citing *Perkins v. Time Ins. Co.*, 898 F.2d 470 (5th Cir. 1990); *Coyne & Delany Co. v. Selman*, 98 F.3d 1457 (4th Cir. 1996); *Morstein v. National Ins. Servs.*, 93 F.3d 715 (11th Cir. 1996) (en banc), *cert. denied*, 117 S. Ct.

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[4] This claim, even if not preempted by ERISA, would have been properly dismissed on the merits. As a matter of law, Steve Parrino cannot have been "induced" to join the FHP Plan, as Petitioner claims. (See Petition at 3.) As explained above, he did not select the Plan. Rather, FHP entered into an agreement with Parrino Trucking, Inc., a business owned by Steve's father, Nick Parrino, to provide health benefits for its employees. Petitioner listed Steve as an employee on the Plan in order to obtain medical coverage for Steve's pre-existing cancerous condition. These facts do not give rise to a claim for fraudulent inducement.

769 (1997)). This purported split is based upon Petitioner's misreading of cases that (1) were never raised in his briefs to the Court of Appeals; (2) do not alter the result in this case; and (3) do not create an intercircuit split.

First, Petitioner waived any argument based upon these cases because he did not refer to them in his briefs in the Court of Appeals. *See Officers for Justice v. Civil Serv. Comm'n of the City & County of San Francisco*, 979 F.2d 721, 726 (9th Cir. 1992). Second, the cases cited by Petitioner hold that ERISA does not preempt fraud claims against *non-ERISA entities* such as insurance *agents*. *See Perkins*, 898 F.2d at 473 (5th Cir. 1990); *Morstein*, 93 F.3d at 722; *cf. Coyne*, 98 F.3d at 1470-71 [malpractice claim against insurance broker]. They affirm the rule that ERISA preempts fraud claims against ERISA entities such as insurers and plan administrators (like FHP). *See Perkins*, 898 F.2d at 473 ("ERISA clearly preempts [plaintiff's fraud] claims as they relate to [the insurer defendant]"); *Morstein*, 93 F.3d at 723 & n.11; *Coyne*, 98 F.3d at 1470-71. Under these cases, Petitioner's claims against FHP, an ERISA plan administrator, *are* preempted. Accordingly, they do not alter the result reached by the Court of Appeals.[5]

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[5] Plaintiff cites dicta in *Perry v. P*I*E Nationwide*, 872 F.2d 157 (6th Cir. 1989) to support his argument that ERISA does not preempt state law fraud claims alleging inducement to join a plan. (See Petition at 9-10.) But the Sixth Circuit has since clarified the dicta on which Petitioner relies in an opinion holding that ERISA preempts fraudulent inducement claims against an insurer. *See Massachusetts Cas. Ins. Co. v. Reynolds*, 113 F.3d 1450, 1454 (6th Cir. 1997). The *Reynolds* court rejected arguments, ostensibly based on *Perry*, that (1) claims regarding

Third, these cases do not create an intercircuit split. They simply hold that ERISA does not preempt state law claims against *non*-ERISA entities, a conclusion consistent with pre-existing case law and Ninth Circuit precedent. Because ERISA unquestionably preempts fraudulent inducement claims against ERISA entities like FHP, the Court of Appeals correctly affirmed the dismissal of Petitioner's complaint.

B. Certiorari Is Not Warranted On The Commercial Blockade Issue Because The Facts Do Not Give Rise To A Claim Under That Statute.

California's commercial blockade statute, California Civil Code § 3427.1, states that it is "unlawful . . . to intentionally prevent an individual from entering or exiting a health care facility by physically obstructing an individual's passage or by disrupting the normal functioning of a health care facility." Disrupting the normal functioning of a health care facility is defined as "intentionally rendering or attempting to render a health care facility temporarily or permanently unavailable or

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conduct occurring before the existence of an ERISA plan are excluded from preemption, and (2) ERISA does not preempt state law claims when there is no adequate remedy under ERISA. *See id.* at 1453-54 and n.2. In rejecting these arguments, the court explained that (1) *Perry*'s holding was limited to rescission and restitution claims, and (2) *Perry* did not hold that a gap in remedies allows plaintiffs to pursue state law claims. *Id.* (citing *Tolton v. American Biodyne, Inc.*, 48 F.3d 937, 943 n.5 (6th Cir. 1995) (a "gap" in remedies does not affect ERISA preemption)).

unusable by a licensed health practitioner, the facility's staff, or patients." *Id.* § 3427(c).

This statute has nothing to do with this case. Petitioner did not allege that anyone physically prevented Steve from entering or exiting a health care facility, or that any of the defendants disrupted the normal functioning of any such facility, let alone engaged in acts of "intimidation" or "violence." (See Petition at 19.)

Allegations of delay in the processing of medical benefits simply cannot be construed to constitute "commercial blockade" of a health care facility. Petitioner's efforts to evade ERISA preemption of such claims by citing an inapplicable statute were thus properly dismissed. Accordingly, ERISA preemption of the commercial blockade statute is not an issue properly before this Court.

C. The Remaining Authorities Cited By Petitioner Are Inapposite, Waived, Or Both.

1. The Remainder Of The Cases Cited By Petitioner Are Inapposite.

Petitioner cites to several medical malpractice cases in his Petition. (See Petition at 15-16, citing *Roessert v. Health Net*, 929 F. Supp. 343 (N.D. Cal. 1996), *Rice v. Panchal*, 65 F.3d 637 (7th Cir. 1995).) These cases do not apply to the case at hand. Petitioner did not allege medical malpractice or sue FHP on a theory of respondeat superior for an improper medical decision made by a treating physician, as did the respective plaintiffs in *Roessert* and *Rice*. In fact, Petitioner himself expressly

denied in his pleadings that FHP made any medical decisions: "At all times relevant herein, no physician employee of FHP nor any facility owned and operated by FHP ever rendered any medical, hospital, or other health care related professional service to [Steve Parrino]." (S.E.R. 43 at 6, ¶ 16.) Moreover, he denied having any complaint about the medical care Steve received through FHP at Loma Linda: "Plaintiff was, and continues to be, extremely grateful to Loma Linda and its physicians." (*Id.* at 9, ¶ 22.) Simply stated, Petitioner's complaint was not about the quality of the care Steve received; it was about the economic structure of the plan itself. As such, it was unequivocally preempted.

Petitioner's citation to *The Meadows v. Employers Health Ins.*, 47 F.3d 1006, 1009 (9th Cir. 1995) (Petition at 11-12), is also inapposite. There, the court held ERISA did not preempt independent claims brought against an insurer *by a third-party health care provider*. The court explained that because third-party health care providers have no right to sue under ERISA, ERISA would not preempt their action. *See id.* at 1008-10. Because Petitioner is a plan beneficiary, whose claims are clearly preempted by ERISA, this case does not apply.

2. The Statutes Cited By Petitioner Are Waived, Inapposite, Or Both.

Petitioner refers to a number of California statutes, including California Penal Code section 602.11, Business & Professions Code sections 145 and 510, and Welfare & Institutions Code section 14409. (See Petition at 2-3, 11.) Because he did not cite to any of these statutes in his

briefs in the District Court or in the Appellant's Opening Brief in the Court of Appeals, however, he has waived any arguments based upon them. *See Officers for Justice*, 979 F.2d at 726.

Petitioner's argument regarding the "savings clause" (Petition at 9) is also waived. While he made nominal reference to the savings clause in his Appellant's Opening Brief, he did not discuss the relevant section – ERISA § 514(b)(2)(A), 29 U.S.C.A. § 1144(b)(2)(A) – at all. In any case, the savings clause does not save Petitioner's claims from preemption. *See Pilot Life*, 481 U.S. at 48-52, 57; *Kanne v. Connecticut Gen'l Life Ins. Co.*, 867 F.2d 489, 494 (9th Cir. 1988), *cert. denied*, 476 U.S. 1170 (1989).

Finally, Petitioner refers to California Health & Safety Code section 1360, part of the Knox-Keene Health Care Service Plan Act (Cal. Health & Safety Code §§ 1340-1399.60) ("the Knox-Keene Act"). It is well-established that ERISA preempts this Act, which "directly regulates employee benefit plans." *Hewlett-Packard Co. v. Barnes*, 571 F.2d 502, 504 (9th Cir. 1978). In any event, because there is no private cause of action under the Knox-Keene Act, Petitioner's reference to it is inapposite. *See* Cal. Health & Safety Code § 1341 ("Responsibility for the administration and enforcement of this chapter is vested in the Commissioner of Corporations").

IV. CONCLUSION.

For all of the foregoing reasons, Respondents respectfully request that the Court deny the Petition for Writ of Certiorari.

Dated: October 14, 1998

Respectfully submitted,

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